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No. 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.
Petitioner

v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

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BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Indiana (R. 38) is reported at 215 F. Supp. 1. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 43) is reported at 324 F. 2d 903.

JURISDICTION

The judgment of the court of appeals (R. 54) was entered on November 21, 1963. A timely petition for rehearing was denied by the court on January 6, 1964 (R. 54). The petition for certiorari was filed in this Court on April 3, 1964, and granted on May 18, 1964 (R. 55). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Under a collective bargaining agreement providing for arbitration of "alleged violations of the terms of this agreement" and of "questions of . . . alleged noncompliance with past practices, customs or usages relative to working conditions," a union seeks arbitration of a claim that management violated the "recognition" clause of the agreement and departed from past practice in contracting out certain work. The questions presented are:

1. Should the court order arbitration of the grievance, notwithstanding its belief that neither the "recognition" clause nor past practice limited the right of management to contract out work?

2. Is the doctrine of "collateral estoppel" a proper basis for denying arbitration of such a grievance, where in a prior action, involving another contracting-out grievance arising under an identical arbitration clause in an earlier agreement, the court had denied arbitration on grounds which have subsequently been repudiated by decisions of this Court?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This is an action under Section 301 of the Labor Management Relations Act to compel an employer to arbitrate a grievance in accordance with the arbitration provision of the parties' collective bargaining agreement. The union which brought the suit, and which is the petitioner in this Court, is the Independent Petroleum Workers of America, Inc. (hereinafter referred to as the Union). The employer, which is respondent in this Court, is the American Oil Company. For all purposes relevant to this case, American Oil Company is the successor to the Standard Oil Company of Indiana, and both will be referred to herein interchangeably as "the Company."

The Union for many years has been the bargaining representative of the approximately 3,000 production and maintenance employees at the Company's oil refinery at Whiting, Indiana. In that capacity, the Union has negotiated a series of collective bargaining agreements with the Company.

The present case arises under the collective bargaining agreement between the parties which was executed on August 27, 1959. Article II of that agreement (R. 9) established an all-embracing "Grievance Procedure," under which all questions or disputes arising during the term of the agreement were to be handled. It provided for a series of steps, consisting of conferences between Union and Company representatives at ascending levels of authority, and further provided, in Section 9, that matters not resolved in these steps could be referred by either party to arbitration. Section 10, however, provided "as a specific limitation on the foregoing Section 9 of this Article II," the following:

> "A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications, interpretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.
3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:
   (a) the modification by the Company of any of said policies, practices, customs and usages, or
   (b) the discontinuance by the Company of any of said policies, practices, customs and usages, or
   (c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

* * *

"D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (R. 11-12).

In October, 1960, the Company contracted out certain crane-operating work (R. 30). The Union filed a grievance, in accordance with the procedure specified in the

agreement, alleging that the Company's action was in violation of the agreement and in conflict with past practice:

> "The Board of Directors of the IPWA requests that, as required by the recognition clause of the applicable agreement and established past practice, policy, custom and usage, employees of the crane department be assigned and perform all crane operating work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost." (R. 19).

This grievance was processed through the preliminary steps of the grievance procedure but no settlement was reached, and the Union requested arbitration. The Company refused, and the present action was then instituted.

The Prior Litigation

Before describing the proceedings in the present case, it is necessary to summarize a prior litigation between the parties on which the Company in the present case has based a defense of collateral estoppel.

In October, 1957, under a prior collective bargaining agreement, a grievance had arisen concerning the contracting out of certain maintenance and repair work: the erection and tearing down of a scaffold and the performance of cement and stucco finishing in connection with the repair of a garage.[1] The grievance procedure of the agreement which was then in effect was identical to the one involved in the present case. The parties processed the grievance

[1] The facts here described are set forth in the opinion of the Court of Appeals in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (7th Cir. 1960), which is reprinted in Appendix C to the petition for certiorari.

under that procedure but failed to settle it, and the Company refused to arbitrate. The Union therefore filed an action under Section 301 to compel arbitration.

In that case, the Union based its action solely on subparagraph (3) of Section 10A of Article II of the Agreement, which provides for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions. . . ."

The District Court refused to order arbitration. *Independent Petroleum Workers* v. *Standard Oil Co.*, 44 LRRM 2676 (N.D. Ind. 1959). The Court of Appeals for the Seventh Circuit affirmed. *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (reprinted in Appendix C of the Petition for Certiorari).

In reaching its conclusion, the Seventh Circuit relied heavily on the decision of the Fifth Circuit in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 269 F. 2d 633, and, like the Fifth Circuit, decided essentially that the grievance was not arbitrable because both the negotiating history and the past practice of the parties on the substantive issue of contracting out made it clear that the grievance was without merit. The critical section of the opinion reads as follows:

> "In our opinion the language of Section 10A.(3) of the agreement relating to past policies, practices, customs or usages 'relative to working conditions' was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors. *United Steelworkers of America, AFL-CIO* v. *Warrior & Gulf Navigation Company*, 5 Cir., 269 F. 2d 633. This is especially so in view of the history of the negotiations of the parties concerning the performance of work by independent contractors. The con-

tinued bargaining on the subject evidences their intent and understanding.

"In addition, the stipulated facts concerning the past practice of defendant in letting out maintenance and repair work to independent contractors serve to demonstrate that the subject had always been treated as a matter of managerial prerogative." 275 F. 2d at 709.

The court of appeals decision issued on March 2, 1960. On June 20, 1960, this Court reversed the *Warrior & Gulf* case on which the Seventh Circuit had relied. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960).

The Proceedings In The Present Case

The crane work involved in the present case was contracted out in October, 1960. The Union's complaint sought arbitration under the agreement of August 27, 1959, which had been negotiated while the prior litigation was pending. The complaint was in two parts. It alleged, first, that the grievance was arbitrable under subparagraph (1) of Section 10A, which provides for arbitration of "questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement." Second, it alleged, as in the 1957 case, that the grievance was arbitrable under subparagraph (3) of Section 10A (R. 4-7).

The Company, in its answer, denied the existence of a past practice and denied that the claim of violation of the agreement was arbitrable (R. 20-22). As an additional defense, the Company alleged that the issue presented in the complaint was identical to the issue which had been presented in the prior litigation, and that therefore any relief on the present complaint was barred (R. 22-24).

Both parties moved for summary judgment. The Union's motion relied exclusively on its first claim, based upon the allegation of violation of the agreement (R. 17). The Com-

pany's motion asked for summary judgment on both claims (R. 24).

The district court granted the Union's motion, denied the Company's motion, and directed the Company to proceed to arbitration of the grievance (R. 42). The court, in a memorandum opinion, said:

> "Plaintiff alleges a violation of the collective bargaining agreement as a result of contracting-out work. The contract provides for arbitration of 'alleged violations of this agreement.' Therefore, under the language of the Supreme Court in *Warrior*, at page 585, this dispute must be submitted to arbitration" (R. 41).

The earlier decision by the court of appeals, the district court held, was inapplicable because it had been decided solely on the basis of Subparagraph (3) of Section 10A, dealing with arbitration of questions involving past practices. Furthermore, that decision was made prior to the Supreme Court's *Warrior* opinion and relied heavily on the decision of the Fifth Circuit in the *Warrior* case which was subsequently reversed (R. 41).

On appeal, the court of appeals reversed the decision of the district court, and remanded the case with directions that the Union's motion for summary judgment be denied and the Company's motion on both claims be granted (R. 53).

Although the court's order disposes of both of the Union's claims, its opinion discusses only the claim that the grievance was arbitrable under subparagraph 1 of the arbitration provision, which provides for arbitration of alleged violations of the agreement. The grievance was not arbitrable under that provision, the court said, because there is no clause in the agreement dealing with contracting out. Pointing out that the Union relied on the recognition clause as the basis for its grievance, the court held that that clause was inapplicable because it made no reference either to arbitration or to the contracting out of work. The court stated that

that clause only required the Company to bargain with the Union on wages, hours and working conditions. Since the Company had bargained on this very grievance, the court concluded that it had fulfilled its obligations under the recognition clause (R. 46-47).

To the Union's argument that this question was for the arbitrator since the Union had alleged that there was a violation of the agreement, and the arbitration clause made arbitrable any questions "involving or arising from applications, interpretations or alleged violations of the terms of this agreement," the court responded that "plaintiff's position is devoid of all logic. It is without merit and we so hold" (R. 48).

The court went on to refer to the bargaining history on the subject of contracting out and concluded that this history fortified its conclusion that the plaintiff's claim was without merit (R. 48-49).

The court then turned to the question raised by the Company's reliance on the prior decision of the court of appeals. It concluded that, although in the first case the Union had relied on the past practice clause while in this case it was relying upon the contract violation clause, the dispute was essentially the same. Ignoring the fact that this was a new and separate grievance arising out of a new fact situation under a new collective agreement, the court said that "the plaintiff in both cases has presented the same claim or demand . . . The only difference is that in the present case it offers in support of its claim a different reason. . . ." The Union, therefore, was barred by the doctrine of collateral estoppel (R. 49-50). The Court summed up its holding in the following words:

> "Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration, and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action" (R. 52).

SUMMARY OF ARGUMENT

I

In two cases decided in 1960, *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, this Court held that when a collective bargaining agreement provides for arbitration of all questions involving its interpretation and application, any grievance claiming that the employer has violated the agreement presents an issue to be resolved by arbitration. The Court stressed that the merits of the grievance itself should not be considered in determining whether it is subject to arbitration.

Under those principles, the grievance presented in this case is plainly arbitrable. The agreement provides for arbitration of "alleged violations of the terms of this agreement" and of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." The Union's grievance falls squarely within both of those provisions, since it claimed both that the Company's action had violated the "recognition clause" of the agreement and that it was contrary to past practice.

In holding to the contrary, the court below made the error of deciding the merits of the grievance, instead of deciding whether it was arbitrable. It concluded that the "recognition clause" only required the Company to bargain with the Union, but did not in any way restrict its right to contract out work.

The court characterized as "devoid of all logic" the contention that the fact that the Union had alleged a violation of the recognition clause was sufficient to make the grievance arbitrable. Yet this argument, which the court below summarily rejected, is precisely what this Court held in *American Manufacturing* and *Warrior & Gulf*.

Although irrelevant, it is noteworthy that the Union's claim that the recognition clause had been violated is not so

far-fetched as the court seemed to think. There is a substantial body of arbitration opinion holding that a recognition clause such as is found in most collective bargaining agreements does imply some limitation on the right of management to reduce the scope of the bargaining unit by contracting out work.

The Company has attempted to distinguish *American Manufacturing* and *Warrior & Gulf* on the ground that the agreement in the present case has a provision stating that matters "not covered in this Agreement" are not subject to arbitration, but that the Union shall have the right to strike over such matters. This language excludes from arbitration any grievance not based on the agreement. For example, a claim that certain contracting out is unfair, even though not in violation of the agreement, would not be subject to arbitration. In this case, however, the Union has claimed rights under the agreement, and that claim is plainly subject to arbitration.

The fact that the Union has the right to strike on matters *not* subject to arbitration is not a basis for construing the provisions which define the matters which *are* subject to arbitration more narrowly than comparable provisions were construed in *American Manufacturing* and *Warrior & Gulf*. Although those cases did involve agreements with absolute no-strike clauses, the principles they established do not depend upon the presence of such a clause. Mr. Justice Brennan's concurring opinion, 363 U. S. at 573, makes that clear, and every court of appeals which has had occasion to pass on the question has so held.

II

The alternative holding of the court below, that its earlier decision in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (1960) was conclusive as a matter of collateral estoppel on the issues involved in this case, is simply wrong.

First of all, the only issue adjudicated in the earlier case was whether a contracting-out grievance was subject to arbitration under Subparagraph 3 of Section 10A of Article II, which provides for arbitration of alleged violations of past practice. Since the present case involves a wholly different cause of action, the earlier decision cannot be conclusive as to an issue which it did not decide, namely, whether the grievance is subject to arbitration under Subparagraph 1 of Section 10A, which provides for arbitration of alleged violations of the agreement. The court below erred in stating that the present case involves the same "claim or demand" as was involved in the previous case. This case involves an entirely different grievance, involving an entirely different act of contracting out which took place three years after the events which gave rise to the earlier case.

Second, the earlier case was decided before this Court decided *American Manufacturing* and *Warrior & Gulf*, and was based upon an approach to labor arbitration which this Court repudiated in those cases. It is well established that the doctrine of collateral estoppel is not applicable at all "if a change or development in the controlling legal principles" makes the earlier adjudication "obsolete or erroneous, at least for future purposes . . ." *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948). It follows that the doctrine of collateral estoppel cannot be applied in the present case even to the question which was adjudicated in the earlier proceeding.

Third, the principle of collateral estoppel is not applicable here for yet another reason. The present case not only involves a different grievance than was involved in the prior case, but arises under another agreement. It is settled law that a decision on an issue of law in an action based upon one agreement is not binding on the parties in a subsequent action arising under another agreement, even though the language of the two agreements may be identical.

ARGUMENT

I. THE GRIEVANCE IN THIS CASE IS PLAINLY ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT.

In three cases decided in 1960—and often referred to as the "Arbitration Trilogy"—this Court established the basic rules to be applied by the federal courts in suits brought under Section 301 to enforce arbitration provisions in collective bargaining agreements. One of those cases, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, dealt with the enforcement of arbitration awards, and is thus not directly in point here. The other two cases, *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, laid down very clear and specific guidelines for determining when a federal court, in an action under Section 301, should direct arbitration of a grievance arising under a collective bargaining agreement. Briefly stated, those guidelines are as follows:

1. If the agreement provides for arbitration of all questions involving its interpretation and application, any grievance claiming that the employer violated the agreement presents an issue to be resolved by arbitration.

2. The court should not be influenced, in determining whether a grievance is arbitrable, by its own view of the merits of the substantive claim which the grievance asserts.

3. The fact that the specific subject matter of a grievance may not appear to the court to be governed by any substantive provision of the agreement is irrelevant in determining whether the grievance is arbitrable. If the agreement authorizes the arbitrator to interpret and apply the agreement, then it is for him, and not the court, to decide whether or not a particular subject matter is or is not covered by the agreement.

4. In light of the federal policy favoring grievance arbitration, specific exceptions to broad arbitration provisions should be narrowly construed, and doubts should be resolved in favor of coverage.

Applying those principles to the facts of the present case, it is clear that the grievance involved here is subject to arbitration. The agreement provides for arbitration of "questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement" (R. 11). It also provides for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions" (R. 12). The Union's grievance falls squarely within both of those provisions, since it claimed both that the Company's action had violated the "recognition clause of the applicable agreement" and that it was contrary to "established past practice, policy, custom and usage" (R. 19).

In holding to the contrary, the court below committed precisely the error which this Court warned against in the Trilogy—it decided the merits of the grievance, instead of simply deciding whether the grievance was arbitrable under the agreement. The court itself undertook to interpret, not the arbitration provision of the agreement, but the recognition clause on which the union based its substantive claim.

The court's reasoning was quite simple. It pointed out that the recognition clause merely states that the Company recognizes the Union as bargaining agent and agrees to bargain with it concerning wages, hours, and conditions of employment. It "makes no reference," the court stressed, "either to arbitration or to the contracting out of work." Since the Company had admittedly bargained with the Union about this particular grievance, by processing it through the pre-arbitration steps of the grievance procedure, the court concluded that the Company had done all that the recognition clause required it to do (R. 47).

The court scoffed at the Union's argument that "the mere allegation that the agreement has been violated, *ipso facto*, entitled it to arbitration." It characterized this position as "devoid of all logic" (R. 48). Yet the very argument which the court dismissed so cavalierly is the essence of this Court's decision in *American Manufacturing*:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> * * *
>
> "The Union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." 363 U. S. at 567-69.

The court below was, therefore, clearly in error even if we assume that it was correct in its view that the recognition clause couldn't possibly have any bearing on a grievance protesting the contracting out of work. "The agreement is to submit all grievances to arbitration, not merely those

which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." 363 U. S. at 568.

It is irrelevant, although perhaps noteworthy as illustrating the correctness of this Court's approach in the Trilogy, that the Union's claim in this case is not so far-fetched as the court seemed to think. There is a substantial body of arbitration opinion which holds, contrary to the views of the court below, that a recognition clause such as is involved in this case (and in virtually every collective bargaining agreement) does imply some limitation on the right of management to contract out the work of the unit for which the employer has agreed to recognize the union as bargaining agent. The reasoning normally relied upon by arbitrators is exemplified by a decision of Sylvester Garrett, past president of the National Academy of Arbitrators and Chairman of the Board of Arbitration established under the collective bargaining agreement between the United Steelworkers of America and United States Steel Corporation:

> "The inclusion of given individuals in the bargaining unit is determined, not on the basis of *who they are*, but on the basis of the *kind of jobs* which they happen to fill. In view of the fact that the Union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." *National Tube Co.*, 17 Lab. Arb. 790, 793 (1951) (Emphasis in original)[2]

[2] See also *Celanese Corp. of America*, 35 Lab. Arb. 925, 942-43 (1959) (table of contracting-out cases showing 16 instances in which arbitrators relied on the recognition clause); Crawford, *The Arbitration of Disputes over Subcontracting* (published by the Bureau of National Affairs in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators) pp. 51, 67.

Not only do the principles of the Trilogy squarely control this case, but the facts of this case are virtually identical to the facts of *Warrior & Gulf*. In that case, as here, the grievance involved the contracting out of work. In that case, as here, no substantive provision of the agreement expressly restricted the right of management to contract out work. And in that case, as here, the Union had in the past attempted unsuccessfully to negotiate such an express restriction—a fact which was relied on by the Fifth Circuit and the dissenting Justice in this Court in *Warrior & Gulf*, as it was by the court below in the present case. The decision of this Court in *Warrior & Gulf*, therefore, is fully dispositive of the present case as well:

> "The grievance alleged that the contracting out was in violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration.
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." 363 U. S. at 585.

There is another, equally cogent reason why the result in this case is dictated by *American Manufacturing* and *Warrior & Gulf*. In those cases, the agreements provided only that questions of interpretation and application of the agreement were subject to arbitration. The agreement in the present case has such a clause but also has an additional clause providing for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages." The reasoning of *American*

Manufacturing and *Warrior & Gulf*, would seem equally applicable to this latter provision. If any grievance claiming a violation of the agreement is arbitrable under a clause providing for arbitration of questions of interpretation and application of the agreement, then any grievance claiming a departure from past practice must be arbitrable under a clause providing for arbitration of questions of interpretation and application of past practice. A court's view of the merits is no more a basis for denying arbitration in the one case than in the other. In neither situation is there any reason to assume that the parties intended to submit to arbitration only grievances which a court believes have some merit. And in both situations the federal policy favoring grievance arbitration is applicable.

The Company has attempted to distinguish *American Manufacturing* and *Warrior & Gulf* on the basis of the following language, which is found in Article II, Section 10, Paragraph D of the parties' agreement:

> "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (R. 12).

This language, the Company argues, indicates that the parties intended to exclude certain matters from arbitration. Indeed it does. At one time, the parties had an arbitration procedure which provided for arbitration not only of grievances based on the agreement or past practice, but also of "questions pertaining to rates of pay, wages, hours of em-

ployment, or other conditions of employment *not covered by the contract.*" (R. 35, emphasis added). Under that provision, the Union could, for example, have processed through arbitration a claim that management's decision to contract out certain work was simply "unfair" even though not in violation of the agreement. Under the present language, such a claim can be processed as a grievance, but it is not subject to arbitration.

In the present case, however, the Union is claiming not that management has acted unfairly, but that it is acting contrary to the agreement and past practice. That claim, as we have seen, is plainly subject to arbitration.

The Company has also argued that because the language quoted above gives the Union the right to strike over matters which are *not* subject to arbitration under the agreement, the provisions which define the matters which *are* subject to arbitration should be construed more narrowly than were the comparable provisions in *Warrior & Gulf* and *American Manufacturing*. Underlying this argument is the wholly false assumption that the principles announced in the Trilogy are applicable only to agreements which contain absolute no-strike clauses. The Court in those cases did rely, in part, on the federal policy which favors arbitration as a substitute for the strike. But that policy is obviously just as applicable where the agreement gives the union the choice of striking or arbitrating as it is where the union has given up its right to strike in exchange for arbitration. Mr. Justice Brennan's concurring opinion in *American Manufacturing* and *Warrior & Gulf* makes clear that the principles announced in those cases do not depend upon the presence of a no-strike clause in the agreement 363 U. S. at 573. And every court of appeals which has had occasion to pass on the question has so held. *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 326 F. 2d 758 (2d Cir. 1964), *affirming per curiam* 218 F. Supp. 82 (S.D.N.Y. 1963); *United Steelworkers* v. *General Elec. Co.*, 327 F. 2d 853

(6th Cir., Feb. 19, 1964), *affirming* 211 F. Supp. 562 (N.D. Ohio 1962); *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists,* 304 F. 2d 449 (1st Cir. 1962) (in which precisely the same argument the Company here has made was made in Appellant's Brief).[3] See also *Drake Bakeries Inc.* v. *Local 50, American Bakery Workers,* 370 U. S. 254, 261 n. 7.[4]

Moreover, to the extent that the Company's argument assumes that the Union would have the right to strike over the grievance involved in this case, it begs the very question

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[3] The employer in that case argued as follows:

"The *Warrior & Gulf* contract contained an 'absolute' no-strike clause in the contract, by which the Union bound itself not to strike over any grievances during the life of the contract . . .

"Here, in sharp contrast, the contract contains an express exception to the no-strike clause, in all cases where the Company denies that a particular grievance presents an arbitrable question. Section 13 of Article XVIII. In other words, the parties here, with respect to disputes not resolved in the grievance procedure, have bargained, not for the absolute *quid pro quo* found in *Warrior & Gulf* (of arbitration in every instance) but for an alternative: if the particular issue, arbitrability of which has been disputed by the Company, is (by reason of its broad scope or significance or otherwise) of sufficient concern to the Union, the Union is given express freedom to use, or threaten the use of, its customary and powerful sanction, the strike. Otherwise stated, the appellant Company has deliberately accepted the risk of a strike in order to protect itself against unwarranted arbitral intrusion into areas of solely management concern. The whole concept and approach to the arbitration clause is completely and significantly different from the *Warrior & Gulf* case." Brief for Appellant, *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists,* 304 F. 2d 449 (1st Cir. 1962). pp. 15-16.

[4] The only decision of which we are aware that seems to hold that the principles of *American Mfg.* and *Warrior & Gulf* are inapplicable where there is a right to strike is *Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 217 F. Supp. 622 (W.D. Pa. 1963). That case, however, seems in conflict with a decision of the Third Circuit in a suit to compel arbitration brought on the same agreement, and involving the same parties, in which the court stated that those principles were controlling. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93 (3rd Cir. 1960).

which is at issue here. The agreement clearly deprives the Union of the right to strike as to any matter which is subject to arbitration. Thus, if, as we have contended, the grievance involved here is arbitrable, it follows that the Union would not have the right to strike over it.

In short, the language of Article II, Section 10, paragraph D simply has nothing to do with this case. The question here, rather, is whether the grievance is arbitrable under subparagraph (1) of paragraph A, which provides for arbitration of questions involving "alleged violations of the terms of this agreement," and subparagraph (3), which provides for arbitration of questions of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." Since the grievance alleged both a violation of the agreement and a departure from past practice, it is plainly arbitrable under both of those provisions.

The only remaining question is whether this result, which is required as a matter of contract interpretation, is nevertheless precluded by the doctrine of collateral estoppel. We turn now to an examination of that question.

II. TO THE EXTENT THAT THE COURT BELOW RELIED UPON THE DOCTRINE OF COLLATERAL ESTOPPEL IN SUPPORT OF THE RESULT IT REACHED, ITS DECISION IS CLEARLY ERRONEOUS.

As an alternative basis for its decision, the court below held that its earlier decision in *Independent Petroleum Workers v. Standard Oil Co.*, 275 F. 2d 706 (1960), was conclusive as a matter of "collateral estoppel" on the issues involved in the present case. This aspect of the court's decision is simply wrong, for the following three reasons:

1. The only issue adjudicated in the earlier case was the arbitrability of a contracting-out grievance under Subparagraph (3) of Section 10A of Article II. Since the present case involves a different grievance, and therefore a different

cause of action, the earlier decision cannot be conclusive on an issue which it did not decide—namely the arbitrability of a contracting out grievance under Subparagraph (3).

2. The doctrine of collateral estoppel does not apply where between the first action and the second one, intervening judicial decisions have rendered the first decision obsolete.

3. The present case not only involves a different grievance than was involved in the prior case, but it also arises under a different agreement. It is settled law that a decision on an issue of law in an action based upon one agreement is not binding on the parties in a subsequent action involving another agreement, even though the language of the two agreements may be identical.

All three of these principles are firmly established by this Court's decision in *Commissioner v. Sunnen*, 333 U. S. 591 (1948). The question in that case was whether a taxpayer was liable for income tax on royalties paid by a corporation under several patent licensing agreements between the taxpayer and the corporation. The taxpayer claimed that he was not liable for taxes on these royalties because he had assigned his entire right, title and interest in the licensing agreements to his wife, and the royalties had in fact been paid to her. Moreover, the taxpayer claimed that the Commissioner was barred from asserting these tax claims because, in a prior proceeding, the Board of Tax Appeals had held that the taxpayer was not liable for income tax on the royalties paid to his wife under one of these licensing agreements.

The Court began its opinion by explaining the difference between *res judicata* and collateral estoppel. The former doctrine, the Court said, "applies to repetitious suits involving the same cause of action," and precludes relitigation of any matter which might have been raised in the original proceeding. 333 U. S. at 597. Collateral estoppel, on the other hand, applies "where the second action be-

tween the parties is upon a different cause or demand." In that situation, the Court stated:

> "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the findings or verdict was rendered.' [citations omitted] *Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time.*" 333 U. S. at 597-98 (emphasis added).

As applied to the present case, this means that—contrary to the holding of the court below—the earlier decision that a contracting-out grievance was not arbitrable under subparagraph 3 (the "past practice" provision) could not in any event bar a subsequent claim for arbitration of another grievance under subparagraph 1 (the "contract violation" provision) since the latter claim, while "it might have been tendered and decided" in the first case, was "not in issue in the first proceeding."[3]

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[3] This principle was recognized by this Court as early as 1877 in *Cromwell* v. *County of Sac*, 94 U. S. 351, 353:

> "But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict, was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also *Restatement, Judgments* § 70 Comment c (1943): "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action."

The court below, although it used the term "collateral estoppel," actually applied the principle of *res judicata*, on the apparent theory that the present action was based on the same cause of action as was involved in the earlier one. That is simply not the case. The earlier action sought to compel the Company to arbitrate a grievance which protested the contracting out of certain work connected with the erection and dismantling of a scaffold and the stucco finishing of a garage, 275 F. 2d at 709. This work was performed in 1957. The present action seeks to compel the Company to arbitrate an entirely different contracting-out dispute, involving the performance of certain crane operating work which took place in 1960. The statement of the court below that "plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question" (R. 50), ignores the fact that the two cases involved entirely different disputes. The two causes of action are as different as two negligence actions arising out of different automobile accidents involving the same parties.

It is thus plain that the doctrine of collateral estoppel, as restated in *Sunnen*, establishes that the prior decision cannot bar arbitration under subparagraph 1, since the right to arbitration under that provision was not adjudicated in the prior case. In any event, the other principles established by *Sunnen*, make clear that the doctrine of collateral estoppel is not applicable to any of the issues involved in the present case.

After setting out the general rule of collateral estoppel, the Court in *Sunnen* went on to explain that that rule is is not always applicable even to questions which have previously been adjudicated in prior actions between the same parties. Specifically, it is not to be applied if "a change or development in the controlling legal principles" makes the earlier determination "obsolete or erroneous, at least for future purposes . . ."

> "That principal is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time . . ." 333 U. S. at 599.

The Court expressly stated that one type of intervening change which can make the doctrine of collateral estoppel inapplicable is "a modification or growth in legal principles as enunciated in intervening decisions of this Court . . ." 333 U. S. at 591.

Accordingly, even if the principle of collateral estoppel might otherwise be applicable in the present case, the fact that this Court's decisions in *American Manufacturing* and *Warrior & Gulf* were rendered subsequent to the earlier decision of the Court below, and totally undercut the basis on which that earlier decision was rendered, means that the parties are not bound to the obsolete principles of law relied on in the earlier case.[8] As the District Court in the present case stated, "Had *Warrior* been decided prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different" (R. 41).

Finally, the Court in *Sunnen* ponted out that the earlier proceeding had involved royalty payments under only one licensing agreement executed in 1928, while the pending case involved payments under several other, though essentially identical, licensing agreements as well. Even though the issues raised under all of the licensing agreements were identical, the Court held that the doctrine of collateral estoppel, if applicable at all, could apply only to the taxability of the payments made under the particular agreement involved in the earlier proceedings:

[8] See also *State Farm Mutual Ins. Co.* v. *Duel*, 324 U. S. 154, 162 (1945); *Restatement, Judgments* § 70 Comment f. (1943).

". . . if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable reliance may be placed upon the ordinary rule of *stare decisis*. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matters raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment. . . .

"It is readily apparent in this case that the royalty payments growing out of the license contracts which were not involved in the earlier action before the Board of Tax Appeals and which concerned different tax years are free from the effects of the collateral estoppel doctrine. That is true even though these contracts are identical in all important respects with the 1928 contract, the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract. . . ." 333 U. S. at 600-602.

Accordingly, the doctrine of collateral estoppel cannot apply in the present case at all for the simple reason that the present action arises under a different collective bargaining agreement than was involved in the earlier decision.[7]

[7] See also *Restatement, Judgments* § 70, Comments b, e (1942); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 7 (1942); Note, 55 Harv. L. Rev. 120, 121 (1941). *Cf. Tioga R.R. v. Blossburg*

The earlier case can therefore be relied on only as precedent, and its value as precedent is nil because of the subsequent contrary decisions of this Court.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed.

Respectfully submitted,

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

& Corning R.R., 20 Wall. 247 (1874) (holding that an issue of contract interpretation previously decided "cannot be litigated again on the same contract").